

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

THOMSON PRECISION BALL	:
COMPANY LLC, successor to THOMSON	:
PRECISION BALL COMPANY, INC.,	:
Plaintiff,	:
	:
-vs-	: Civ. No. 3:00cv1000 (PCD)
	:
PSB ASSOCIATES LIQUIDATING	:
TRUST, JOSEPH S. MARTINELLI,	:
ROBERT N. MARTINELLI, PHILIP	:
MARTINELLI, and UNKNOWN	:
PIONEER ENTITIES 1-10,	:
Defendants.	:

RULING ON MOTION TO DISMISS

Defendants (other than Unknown Pioneer Entities 1-10) move to dismiss the Complaint in its entirety. They argue that plaintiff's claims pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9607(a) and 9613(f)(1), are deficient because 1) plaintiff, as the present owner of a claimed contaminated site, cannot maintain a cost recovery action under 42 U.S.C. § 9607(a), and 2) plaintiff cannot bring a contribution action under 42 U.S.C. § 9613(f)(1) where there is no present or past enforcement action pursuant to 42 U.S.C. § 9606 or 9607(a). Defendants also seek dismissal of the pendant state law claims for lack of subject matter jurisdiction. The motion to dismiss is **denied**.

I. BACKGROUND

Thomson Precision Ball Company LLC, successor to Thomson Precision Ball Company, Inc. (collectively "Thomson") maintains its principal place of business at 37 Mill Street, Unionville, Connecticut (the "Site"). Thomson purchased the Site from Pioneer Steel Ball Company Inc. ("Pioneer") on February 19, 1988 pursuant to an Asset Purchase Agreement

(“Agreement”). PSB Liquidating Trust, the successor and assignee of Pioneer, is bound by the terms and conditions of the Agreement.

Pioneer owned, and manufactured ball bearings at, the Site from 1948 until 1988. It then sold the Site and other assets to Thomson. Pioneer’s manufacturing process involved the use and on-site storage of metals, gasoline, coolant, oil, and kerosene. It generated large volumes of waste, including sludges and waste oils. In relation to its negotiations in 1987 to purchase Pioneer’s assets, Thomson retained an environmental consulting firm, Environmental Risk Limited (“ERL”), to investigate and assess Site environmental problems.

ERL interviewed Pioneer employees and at least one individual defendant. ERL was told that on-site waste disposal had been contained within one “metals sludge pit” and two “wastewater settling lagoons.” Defendants represented that the pit was properly closed in 1987 and the lagoons were to be closed in the near future. Based on defendants’ representations, ERL’s investigation focused on these areas.

Pioneer submitted a certification to the State of Connecticut (“Declaration”), executed on February 3, 1988 with the ERL Report attached. Pioneer certified that it would address the environmental conditions identified in the ERL Report and that the ERL Report was true, accurate, and complete. Thomson relied on this certification. Pioneer represented in the Agreement that it had no knowledge of environmental contamination other than that disclosed in the Declaration. Under the Agreement, Thomson assumed responsibility for completing remediation of the environmental conditions described in the Declaration, but none other.

Despite its representations, Pioneer was aware that: 1) on-site waste disposal had occurred at numerous other locations on the Site; 2) spillages of sludges, waste oils, and other hazardous substances had occurred in the manufacturing building and such wastes had infiltrated

the ground; 3) other discrete disposal locations containing hazardous substances existed under the buildings and in other areas of the Site; and 4) Pioneer's routine practices in connection with on-site transportation of sludge and other hazardous wastes had created widespread contamination in subsurface soils in areas other than the pit and lagoons. Defendants not only failed to reveal this information, but also affirmatively concealed it, e.g., by covering areas with dirt and cementing over a disposal location.

Plaintiff seeks 1) reimbursement of its incurred costs, i.e., investigating expenses and response costs related to the release or threat of release of hazardous substances at the Site, and prejudgment interest; 2) a declaration of defendants' liability for future Site response costs; 3) a declaration that defendants breached the Agreement; 4) a declaration that defendants misled and intentionally deceived plaintiff, ERL, and others regarding environmental conditions to induce plaintiff to purchase the Site; 5) a declaration that defendants fraudulently concealed environmental contamination; 6) a declaration that defendants acted in bad faith in their obligations under the Agreement; 7) an assessment of damages; 8) rescission of the Agreement; and 9) an order directing defendants to execute a release and satisfaction of their mortgage and personal property security interest that secures Site purchase installment payments under the Agreement.

II. DISCUSSION

A. Standard of Review

A complaint may not be dismissed under Fed.R.Civ.P. 12(b)(6) unless the movant demonstrates "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (citation and internal quotation marks omitted). The factual allegations are presumed to be true, and all factual

inferences are to be drawn in the plaintiff's favor. See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-250 (1989); Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

B. CERCLA

Section 107 of CERCLA, 42 U.S.C. § 9607, provides a private right of action to recover costs incurred in responding to the release or threatened release of “hazardous substances,” as defined in 42 U.S.C. § 9601(14). See Prisco v. A&D Carting Corp., 168 F.3d 593, 602 (2d Cir. 1999). To state such a claim, plaintiff must allege: 1) defendants fall within one of the four categories of potentially responsible parties (“PRPs”) set forth in § 9607(a); 2) the Site is a “facility” as defined by 42 U.S.C. § 9609(9); 3) there is a release or threat of release of hazardous substances at the Site; and 4) plaintiff incurred costs in responding to the release or threatened release. See id. On proof of these elements, a defendant will be strictly liable unless successful in invoking a statutory defense described in § 9607(b). See id. at 603. Plaintiff cannot bring an action under § 9607 if it is a PRP within § 9607(a); rather it would instead be limited to an action for contribution from other PRPs under 42 U.S.C. § 9613(f)(1). See id.; Bedford Affiliates v. Sills, 156 F.3d 416, 424 (2d Cir. 1998).

1. *Section 9607(a)*

Defendants seek dismissal under § 9607(a), arguing that plaintiff is a PRP and thus precluded from recovery. Plaintiff disagrees, claiming that it is an innocent landowner with a statutory defense under § 9607(b)(3).

Section 9607(a) imposes strict liability on the owner and operator of a facility. See Bedford, 156 F.3d at 425. The innocent landowner defense may be applicable to parties otherwise liable. See id. If the release or threatened release was caused solely by the act or omission of a third party, an owner can escape liability, provided 1) it had no direct or indirect

contractual relationship with the third party, and 2) the contamination did not occur in the course of such relationship. See 42 U.S.C. § 9607(b)(3); Bedford, 156 F.3d at 425. A “contractual relationship” includes

land contacts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established

42 U.S.C. § 9601(35)(A). Clause (i) states: “At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.” 42 U.S.C. § 9601(35)(A)(i) (emphasis added).

Defendants contend that plaintiff is not entitled to innocent landowner status as plaintiff knew the Site was contaminated prior to purchase—that plaintiff did not know the extent of the contamination does not, according to defendants, entitle it to a “partial” innocent owner status. Plaintiff argues for innocent owner status as defendants concealed the contamination for which plaintiff claims response costs.

Defendants misconstrue the defense. Their interpretation would create an incentive for landowners to conceal most, but not all, contamination prior to sale to escape liability under § 9607(a). The defense requires not lack of knowledge or reason to know of any hazardous substance, but rather of any hazardous substance that is the subject of the release or threatened release. See 42 U.S.C. § 9601(35)(A)(i). Plaintiff alleges that it did not know or have reason to know of hazardous substances not specified in the Agreement that are the subject of release or threatened release and thus the subject of the instant action. Based on the allegations, plaintiff is

entitled to innocent landowner status with respect to its claims based on the hazardous substances not disclosed by defendants.

2. *Section 9613(f)*

Defendants also seek dismissal of plaintiff's contribution claim, arguing it is flawed because plaintiff has failed to state a claim under § 9607(a). According to defendants, CERCLA does not permit a plaintiff to recover under § 9613 if it cannot recover under § 9607(a). As plaintiff states a claim under § 9607(a), however, this argument is unpersuasive. Moreover, defendants' statement of the law is incorrect.

Section 9613(f) states, in relevant part:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. . . . Nothing in this subsection should diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1). Defendants are potentially liable under § 9607(a)(2) as they come within the purview of "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). There is no requirement that defendants must be potentially liable to the party seeking contribution, only that defendants be potentially liable. Moreover, the Second Circuit has held that PRPs not able to recover under § 9607(a) are permitted to recover under § 9613(f). See Bedford, 156 F.3d at 424. Accordingly, even if plaintiff is unable to recover against defendants under § 9607(a), it could still seek contribution under § 9613(f).

III. CONCLUSION

Defendants' renewed motion to dismiss (doc. 7) is hereby **denied**.

SO ORDERED.

Dated at New Haven, Connecticut, January 3, 2001.

Peter C. Dorsey
Senior United States District Judge